Cited
As of: Jul 27, 2010

LYONS DIECASTING COMPANY, and JACKSON GROUP, INC., Plaintiffs/Appellants, v. NEC, INC., Defendant and Third Party Plaintiff/Appellee, v. UNITED STATES FIRE INSURANCE COMPANY, Third Party Defendant/Appellant

No. 89-387-II

Court of Appeals of Tennessee, Middle Section, at Nashville

1990 Tenn. App. LEXIS 296

April 27, 1990, Filed

PRIOR HISTORY: [*1] FROM THE EQUITY COURT, DAVIDSON COUNTY, AT NASHVILLE, THE HONORABLE C. ALLEN HIGH, CHANCELLOR.

DISPOSITION: AFFIRMED AND REMANDED

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, buyer and seller's insurer, sought review of a decision in the Equity Court, Davidson County, at Nashville (Tennessee), which denied all of buyer's claims except one and entered judgment on that single claim against appellees, seller and its insurer.

OVERVIEW: The buyer filed a lawsuit based on an agreement to buy seller's company and made claims for the cost of replacing destroyed equipment, for receivables the seller refused to repurchase as previously agreed, for delinquent worker's compensation premiums discovered at an audit, and for attorneys' fees. The trial court entered a judgment against the seller on the destroyed equipment with a judgment over against the seller's insurance carrier. The seller's insurer and the buyer both appealed. On appeal, the court affirmed the trial court's findings as to damages and found that the seller was not required to repurchase the receivable at issue because the purchase price was reduced by that amount. The court held that the buyer was liable for payment of the worker's compensation premiums because the agreement contemplated ordinary business liabilities that might arise after closing. As to the seller's insurer, the court found that the equipment was unintentionally destroyed and not excluded from the subject policy and that the loss was covered by the policy issued by the seller's insurer. The court denied attorneys' fees because the seller did not materially breach the purchase agreement.

OUTCOME: The court affirmed the decision in the trial court and taxed the appeal costs to the buyers. The court found that because the only meritorious claim against the seller was one for which the loss was covered under a policy with the seller's insurer, the seller did not breach its purchase agreement to entitle the buyers to attorneys' fees.

CORE TERMS: die, insured, spectrum, accounts receivable, premium, financial statements, coverage, chancellor, doubtful, destruction, purchase price, insured's premises, occurrence, collected, warranty, audit, scrap, intentional act, covering, worker's compensation, personal property, outstanding, ownership, scrapped, reserved, elected, insurer, measure of damages, preponderates, replacement

LexisNexis(R) Headnotes

Contracts Law > Types of Contracts > Bailments
[HN1] Bailment is defined as a delivery of personalty for some particular purpose, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his direction, or kept until he reclaims it.

Contracts Law > Sales of Goods > Damages & Remedies > General Overview
Contracts Law > Types of Contracts > Bailments
Torts > Vicarious Liability > Bailees
[HN2] The general measure of damages for goods lost by a bailee is the value of the goods calculated at the time of destruction. In Tennessee if the lost property has no market value, the measure of damages is the actual value of the property to the owner, ascertained in some rational way and from such elements as are obtainable. Some relevant considerations are evidence of the original cost, of the cost of replacement, of the condition of the goods, of the use to which they were being put, and all other relevant facts.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Torts > Damages > General Overview
[HN3] The amount of damages in a case is a question of fact for the trier of fact, and when a case is tried without a jury, the findings of the chancellor are presumed to be correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d).

Insurance Law > Claims & Contracts > Fortuity Doctrine
Insurance Law > Property Insurance > Coverage > All Risks
[HN4] A policy of insurance insuring against "all risks" is to be considered as creating a special type of insurance extending to risks not usually contemplated, and recovery under the policy will generally be allowed, at least for all losses of a fortuitous nature, in the absence of fraud or other intentional misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage.

Insurance Law > General Liability Insurance > Exclusions > Intentional Acts
Insurance Law > Property Insurance > Coverage > Arson & Intentional Loss > General Overview
Insurance Law > Property Insurance > Exclusions > General Overview
[HN5] An "intentional injury" exclusion does not apply to intentional acts of the insured which are not wrongful, but which may necessarily cause a consequential loss to a third party.

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ROBERT L. ECHOLS, DEARBORN & EWING, Nashville, Tennessee, Attorney for Defendant and Third Party Plaintiff-Appellee.

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JUDGES: BEN H. CANTRELL, JUDGE. HENRY F. TODD, PRESIDING JUDGE, SAMUEL L. LEWIS, JUDGE, concur.

OPINION BY: CANTRELL

OPINION

OPINION

BEN H. CANTRELL, JUDGE

When NEC, Inc. sold Lyons Diecasting Company to Jackson Group, Inc., the stock purchase agreement contained certain warranties about claims against the company (Lyons) and the company's accounts receivable. This is an action on the warranties in the agreement and a separate claim for worker's compensation insurance premiums paid by the purchaser pursuant to an audit by the worker's compensation carrier after the closing. The Chancery Court of Davidson County rendered a judgment against NEC on one of the warranty claims with a judgment over against NEC's insurance carrier. The plaintiffs, Lyons and Jackson, appeal the amount [*2] of the judgment, the denial of the other claims, and the failure to award them attorneys' fees and expenses. The insurance company appeals the judgment over against it.

A.

The Factual Background

In June of 1986, NEC entered into an agreement to sell the outstanding shares of Lyons to Jackson. The agreement contained the following representations and warranties:

4.2 There are no facts in existence on the date hereof and which are known, or should have reasonably been known to [NEC] or [Lyons] which might reasonably serve as the basis for any material liabilities or obligations of [Lyons] not disclosed in this agreement or in the schedules hereto or delivered to [Jackson] pursuant to this agreement.

* * *

4.7 The list of Accounts Receivable includes additions thereto as of March 6, 1986 and accounts receivable which, as of March 6, 1986, are outstanding and unpaid more than thirty days past the date of billing thereof. Schedule 4.7 hereto specifically indicates all such notes and accounts receivable from any Affiliated Parties. Except to the extent collected since February 28, 1986, all such Accounts Receivable reflected on the Financial Statements and Schedule 4.7 hereto [*3] are, and all Accounts Receivable accruing between February 28, 1986 and the closing will be, (i) bona fide claims against debtors for work performed by [Lyons] and (ii) to the best of the knowledge of [NEC] subject to no defenses, setoffs or counterclaims. In the event that any such accounts have not been collected within thirty days from the Invoice Date, [NEC] shall purchase all such accounts from [Lyons].

Lyons conducts a diecasting business. It manufactures dies and also makes parts using dies belonging to others. In May of 1986, after the signing of the contract under consideration but before the date of closing, Lyons inadvertently scrapped a large die owned by Fawn Engineering. The scrap purchaser came to Lyons' plant and transported the die to a location where it was eventually melted down.

The problem came to light in August of 1986, after Lyons was operating under the new ownership, when Fawn ordered a quantity of parts from Lyons that required the use of the scrapped die. Lyons felt compelled to replace the die in order to satisfy its customer and in order to avoid any potential liability to Fawn for its lost production. The expenses Lyons incurred in replacing the die [*4] comprise the first claim in this action.

One of the accounts appearing in the financial statements that became a part of the contract is an accounts receivable entitled "Spectrum Enterprises." The amount shown as due and payable is $ 9,933.28. When the account was not paid, Lyons demanded that NEC pick up the account in accordance with Section 4.7 of the agreement. This is the second area of dispute covered by this action.

The third area of dispute concerns premiums for worker's compensation insurance that became due after the sale pursuant to an audit which covered a period of time prior to the sale.

B.

The scrapped die

The dispute over the die is really a question of the measure of the damages for its destruction. Although neither of the parties to this part of the lawsuit talks in specific terms about the character of Fawn's claim against Lyons, we think the amount of the claim is governed by the law of bailments. [HN1] Bailment is defined as "a delivery of personalty for some particular purpose, . . . upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his direction, [*5] or kept until he reclaims it . . . ." *Breeden v. Elliott Brothers, 173 Tenn. 382, 385, 118 S.W.2d 219, 220 (1938).*

[HN2] The general measure of damages for goods lost by a bailee is the value of the goods calculated at the time of destruction. *J. E. Faltin Motor Transportation, Inc. v. Eazor Express, Inc., 273 F.2d 444 (3rd Cir. 1959)*; *8 Am.Jur.2d Bailment § 349*. In Tennessee if the lost property has no market value, the measure of damages is the actual value of the property to the owner, ascertained in some rational way and from such elements as are obtainable. *Cook & Nichols, Inc. v. Pete Marwick, Mitchell & Co., 480 S.W.2d 542 (Tenn. App. 1971).* Some relevant considerations are: "Evidence of the original cost, of the cost of replacement, the condition of the goods, the use to which they were being put, and all other relevant facts," *Clift v. Fulton Fire Ins. Co., 44 Tenn. App. 483, 489, 315 S.W.2d 9, 12 (1958).*

Jackson relies solely on the cost of replacement which it asserts aggregated more than $ 30,000.00. The other evidence in the record shows that the die was made in 1971 at a cost of $ 9,500.00. It had been used sparingly; the number of parts it had been used [*6] to create amounted to approximately five percent of the potential number for which the die could have been used. But, there was also evidence that the die was in "poor" condition, that parts sometimes stuck in it because it was warped, and that it had to be frequently oiled. On one occasion a part stuck in the die and had to be remelted.

The chancellor found that the value of the die and its associated tooling at the time of its destruction was $ 13,000.00. Since [HN3] the amount of damages in a case such as this is a question of fact for the trier of fact, *Ford*

Motor Co. v. Taylor, 60 Tenn. App. 271, 446 S.W.2d 521 (1969), and since this case was tried without a jury, the findings of the chancellor are presumed to be correct unless the preponderance of the evidence is otherwise. Rule 13(d), Tenn. R. App. P. Based on the factors to be considered and the evidence in the record, we cannot say that the evidence preponderates against the chancellor's finding of damages.

C.

The Spectrum account

Based on the representations in the contract of sale that all accounts not collected within ninety days would be repurchased by NEC, the plaintiffs insist that they are entitled to $ 9,933.28, [*7] the amount of an account owed by Spectrum Enterprises. The chancellor made the following findings of fact with respect to the spectrum account:

The February 28th financial statement, as well as the May 31 financial statement, which determined the final purchase price for the closing, both contained a reserve for doubtful accounts. Although the reserve for doubtful accounts was larger in the February 28 statement than in the May 31 statement, both reserves specifically included the Spectrum account of Nine Thousand Nine Hundred Thirty-Three and 88/100 ($ 9,933.88). As of the May 31 statement, all of the delinquent accounts had been collected or written off except Spectrum, and the reserve for doubtful accounts included only Spectrum, plus a small amount reserved for usual returned parts ($ 1,121.12). This amount in the reserve for doubtful accounts ($ 11,055.08) was deducted on the May 31 statement from the total accounts receivable being sold to Jackson. The effect of the reserve account on the May 31 statement was to reduce the purchase price by the amount in the account. An accountant witness for NEC testified that the reserve for doubtful accounts on the May 31 financial statement [*8] reduced the purchase price by the amount in the reserve.

The Agreement provided that NEC would buy back from Jackson the accounts receivable which were not paid within ninety (90) days of their invoice date. Schedule 4.7 attached to the Agreement (Exhibit 6) contained a list of all accounts receivable outstanding as of March 6, 1986, including Spectrum. As of the May 31, 1986 financial statement, all the delinquent accounts receivable listed on Schedule 4.7 had either been collected by Lyons or written off, except Spectrum, and Spectrum had been deducted from the accounts receivable being purchased by Jackson

The president of Jackson admitted that Jackson received credit for the amount of the Spectrum account on the May 31 financial statement, that the purchase price was reduced by the amount in the reserve for doubtful accounts, that he was surprised that the Spectrum account was listed on Schedule 4.7, and that he did not know why it was listed. The Agreement between NEC and Jackson provided in Section 4.2 that NEC was not liable for any liabilities exceeding One Thousand and No/100 Dollars ($ 1,000) except to the extent reflected or reserved against in the financial statements. [*9] The Spectrum account was reserved against in the financial statements.

In addition to the amount of the Spectrum account ($ 9,933.88), Jackson received credit on the purchase price for the amount in the reserve for doubtful accounts in excess of the Spectrum account to allow for the possible returned parts. This additional credit was One Thousand One Hundred Twenty and No/100 Dollars ($ 1,120.00). (Exhibit 15).

We think the evidence preponderates in favor of the chancellor's findings of fact on this issue. Since the Spectrum account had already been subtracted from the assets of Lyons, Jackson did not pay for that asset at the closing. NEC was not required to purchase that account after the closing.

D.

The worker's compensation premium

The contract between the parties provided that the worker's compensation insurance policy in force prior to the closing would be cancelled by NEC at midnight on the day of the transfer of ownership unless the policy was specifically assumed in writing by Jackson. In the event that the buyer assumed the policy, the buyer would be liable to NEC for the prorated premium.

Jackson did not assume the policy in writing but elected to continue coverage [*10] with the same insurer. In effect the insurer just assigned the existing policy to the new company and changed the experience rating to reflect a change in ownership.

Worker's compensation premiums are finally determined by an audit and depend on the size of the payroll and the loss experience. An audit early in 1987 showed that the company owned additional premiums, some of which, apparently, related back to the time prior to the closing in June of 1986. The plaintiffs assert that NEC is responsible for that deficiency.

The plaintiffs acknowledge that the contract does not contain a warranty covering the insurance premiums. What the contract does contain, in Section 4.2, is a recognition that the company may have liabilities, incurred in the ordinary course of business, other than the one shown on the financial statements. We believe the insurance premiums fall into that category. Since the parties contemplated that there might be liabilities not disclosed that arose in the ordinary course of business, the plaintiffs have no claim for reimbursement.

The result we have reached on this issue is buttressed by the fact that the plaintiffs had the option to cancel the policy on the date [*11] of the closing, but -- for whatever reason -- elected not to do so, knowing that an adjustment in premium was possible after the audit. We think the plaintiffs voluntarily assumed the obligation to pay the adjusted premium by electing to keep the policy in force.

The plaintiffs assert that they did in effect cancel the old policy and obtain a new one; that the insurance company simply assigned the old policy number to the company after the closing. We think the contrary appears from the facts that the insurance company billed the company for the additional premiums allegedly due under the old policy and the company paid the bill.

E.

The claim against the insurance company

The chancellor found that the loss of the die was covered by insurance. The policy in question is a broad coverage, multi-peril policy covering "all risks" of direct physical loss of tangible personal property during the policy period. Included in the broad coverage is a loss of personal property of others in the care, custody and control of the insured.

An "all risk" policy insures against all risks except those that are expressly limited by the policy provisions. *Goodman v. Fireman's Fund Ins. Co.,* [*12] *600 F.2d 1040 (4th Cir. 1979).* The principles covering all risk policies have been stated as follows:

[HN4] A policy of insurance insuring against "all risks" is to be considered as creating a special type of insurance extending to risks not usually contemplated, and recovery under the policy will generally be allowed, at least for all losses of a fortuitous nature, in the absence of fraud or other intentional misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage.

43 Am.Jur.2d Insurance § 505.

The insurance company argues that the policy does limit the coverage in such a way that the loss in this case was excluded. The insurance company's first insistence is that the policy does not cover this loss because the insured intentionally destroyed the die. The policy language relied on by the insurance company is found in the definition of an occurrence:

"Occurrence" means an accident, including continuous or repeated exposure to conditions which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

The insurance company insists that an intentional act cannot be an [*13] accident or occurrence under the policy; that the destruction of the die was both expected and intended from the standpoint of the insured. Thus, the argument continues, the policy does not provide coverage for this type of loss.

We are of the opinion, however, that the occurrence in this case comes within the language of the policy. The critical part of the definition says "occurrence means an accident." In our opinion that is what happened here. It is true that the insured intended to scrap the die, but it did so under the mistaken impression that the owner had authorized the action. At most, the action of the insured should be labeled negligent and, therefore, fortuitous.

An exclusion from coverage for injuries expected or intended does not exclude liability for unintentional or unexpected injury. The mere doing of an intentional act by the insured does not relieve the insurer where the result of injuries were unintended . . .

It has been held that [HN5] an "intentional injury" exclusion does not apply to intentional acts of the insured which are not wrongful, but which may necessarily cause a consequential loss to a third party.

43 Am.Jur.2d Insurance § 708.

In our opinion [*14] the intentional act or injury exclusion does not bar the claim in this case.

The insurance company also insists that the policy excluded losses of personal property of others which occurred off the premises of the insured. Since the die was delivered to a scrap dealer who took it away from the insured's premises for destruction, the insurance company argues that the loss was not covered.

The language of the policy relied on by the insurance company is:

This insurance shall cover for the account of the owner other than the named insured, personal property belonging to others in the care, custody, or control of the insured, while (1) in or on the building(s) or (2) in the open (including within vehicles), on or within one hundred feet of the designated premises.

We are of the opinion that the language quoted above does not exclude coverage for the loss of the die. First, where the insured mistakenly sells the property of others for scrap and the transfer to the scrap dealer takes place on the insured's premises, the loss occurs at that time.

In addition, the quoted language does not apply to the property of others destroyed through the negligence of the insured off the insured's premises. [*15] The provision applies to property of others located on the insured's premises and not to the property of others harmed by the insured's negligence. We do not think the quoted language applies to a situation where the insured transports the dye to another location off the insured's premises and negligently causes harm to it.

F.

Legal fees and expenses

The plaintiffs assert that the chancellor erred in refusing to require the defendant to pay the plaintiffs' legal fees and other expenses incurred in the prosecution of the plaintiffs' claims. This assertion is based on Section 7.7(b) of the contract which provides as procedure for making claims arising out of a breach of the agreement.

Since we have concluded that the only claim against NEC was for the loss of the die and that the loss was covered by insurance, we do not think that NEC committed a material breach of the stock purchase agreement. At the time Lyons and Jackson discovered the existence of Fawn's claim, they could have pursued the claim against the insurance company. Instead they elected to couple this claim with others, which we have found to be unsubstantiated, and proceed against NEC. Under these circumstances, [*16] we are of the opinion that the plaintiffs are not entitled to recover attorneys' fees and other expenses for breach of the agreement.

The judgment of the court below is affirmed, and the cause is remanded to the Chancery Court of Davidson County for any further proceedings necessary. Tax the costs on appeal to the appellants.